Supreme Court, U.S.
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No. 94-1561

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

BETHLEHEM MINERALS COMPANY,
BETHLEHEM MINES CORPORATION,
BETH-ELKHORN CORPORATION AND
BETHENERGY MINES, INC.,

Petitioners,

v.

CHURCH AND MULLINS CORPORATION,
CLAUDE JOHNSON, CHARLIE JOHNSON, JACK
JOHNSON, MARTHA KENDRICK, PRISCILLA
STILTNER, BEN JOHNSON, MOLLY THORNBERRY
AND BETTY JANE JOHNSON STEWART,

Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Kentucky

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioners' claim that due process requires vacatur of the Kentucky Supreme Court's June 4, 1992 Opinion was pressed or passed on below.

2. Whether certiorari is precluded by the existence of an independent and adequate state law ground for decision, where Petitioners obtained the relief they requested, since Special Justice Hays recused himself from further participation in the proceedings below and since the Kentucky Supreme Court reconsidered the merits of the willful trespass issue.

3. Whether certiorari must be denied because the controversy is moot, since the Kentucky Supreme Court reheard the willful trespass issue and decided the issue against Petitioners by a 6 to 1 vote.

4. Whether the Kentucky Supreme Court's Order Denying Petitioners' Petition for Rehearing conflicts with Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986), or otherwise raises any important issue of federal law, when there is no record evidence that any Kentucky Supreme Court Justice or Special Justice who participated in the consideration of this case had any direct, personal, substantial, and pecuniary interest in the outcome of this case.

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STATEMENT OF THE CASE

This case involves two judgments of the Pike County Circuit Court. The first judgment, entered September 16, 1986, determined title to the mineral estate in a 375-acre tract on Three Mile Creek in Pike County, Kentucky, that is commonly known as "Tract 42" (Sept. 16, 1986 Opinion, Findings of Fact and Conclusions of Law). The Pike County Circuit Court found that Petitioners held title to 164 acres of Tract 42, and that Respondents held title to the remaining 211 acres (Id.). The second judgment, entered February 25, 1987, awarded Respondents damages in the principal sum of $16,947,778, plus prejudgment interest, for willful trespass (Feb. 25, 1987 Opinion, Findings of Fact and Conclusions of Law).

Petitioners appealed to the Kentucky Court of Appeals, which, on January 12, 1990, affirmed the trial court's decision

on title, but which reversed the finding of willful trespass and prejudgment interest and remanded for a recalculation of damages. On September 19, 1990, the Kentucky Supreme Court granted discretionary review.

Supreme Court Justice Dan Jack Combs, sua sponte, recused himself. By Order dated September 17, 1991, the Honorable Robert F. Stephens, the Chief Justice of the Kentucky Supreme Court, appointed John Doug Hays as a Special Justice to replace Justice Combs (Appellants' and Cross-Appellees' Response to Motion to Recuse Special Justice John Doug Hays, Exh. A; App., infra, 1a-2a).

Special Justice Hays's appointment was made pursuant to Ky. Rev. Stat. Ann. § 26A.015(3) (Michie 1992), which authorizes the Chief Justice to appoint a Special Justice when any justice is disqualified. To implement the statute, the

Kentucky Supreme Court adopted a procedure for appointment of a Special Justice (Response to Motion to Recuse, Exh. B; App. 3a-5a). At the beginning of each annual term, each justice is required to provide the Chief Justice with a list of not less than ten attorneys from his judicial district who meet the constitutional requirements for service and who have the ability to serve as a Special Justice (App. 4a). Once advised of a justice's disqualification, the Chief Justice appoints a Special Justice from the list previously submitted to him by the disqualified justice (Id.). John Doug Hays was included on the standing list of qualified attorneys from Justice Combs's judicial district.

Contrary to Petitioners' allegation in its Petition for Certiorari (Petition for Writ of Certiorari at 4, 6), Justice Combs did not "personally select" or

"personally designate" John Doug Hays to serve as Special Justice. The Kentucky Supreme Court's September 17, 1991 Order, entered by the Deputy Chief Justice Charles Leibson, states:

> Honorable John D. Hays, a member of the Kentucky Bar with offices in Pikeville, Kentucky, who was appointed by Chief Justice Robert F. Stephens to sit as special justice of the Supreme Court in the determination of this cause by reason of the disqualification of Justice Dan Jack Combs, was on September 17, 1991, prior to any consideration of this cause, administered the Constitutional Oath by the undersigned.

(App. 1a-2a.) Petitioners' allegation that Justice Combs designated Special Justice Hays is based solely on a newspaper article in the Lexington Herald-Leader, dated June 25, 1992. The article quotes Justice Combs as stating: "I just suggested to the Chief Justice that he (Hays) would be a fine special judge. There was no special reason" (Bethlehem Memorandum in Support of Supplemental

Motion to Recuse Special Justice John Doug Hays, Exh. A at B1).

On June 4, 1992, the Kentucky Supreme Court rendered its decision, which reversed in part the court of appeals and reinstated in all respects the judgment of the Pike County Circuit Court (Petition for Writ of Certiorari at App. 1a). The majority opinion was written by Special Justice Hays with the concurrence of three justices; three justices dissented.

On June 24, 1992, Petitioners filed a Petition for Rehearing and a Motion to Recuse Special Justice Hays. The Petition for Rehearing sought reconsideration of the Supreme Court's decision on willful trespass, damages, and prejudgment interest, and incorporated by reference the arguments in the Motion to Recuse (Bethlehem Petition for Rehearing at 2). In seeking recusal, Petitioners wrote that they did not "call into question the

integrity of any member of the Court or Special Justice who sat in this case" (Bethlehem Memorandum in Support of Motion to Recuse Special Justice John Doug Hays at 2). The Petitioners alleged instead that the court's procedure for appointing a Special Justice violated §§ 110(3) and 123 of the Kentucky Constitution (Id. at 6-11). The Petitioners further alleged that Special Justice Hays's impartiality might reasonably be questioned because of his former professional association with the trial judge after the trial judge had left the bench, and because of Hays's withdrawal from representation of third parties involved in unrelated litigation brought against Petitioner BethEnergy Mines, Inc. (Id. at 11-15).[1]

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[1]In the Motion to Recuse, Petitioners complained of Special Justice Hays's previous participation in another trespass action brought against Petitioner BethEnergy Mines, Inc., Osborne v. Beth-

Although the Petitioners were aware from the very instant of Special Justice Hays's appointment of all of the predicate facts upon which they based their Motion to Recuse, the Petitioners concededly waited over nine months to file the Motion, until after the Kentucky Su-

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Energy Mines, Inc., Civil Action No. 88-100 (Pike Cir. Ct.), an unrelated case involving different creditors and different transactions (Bethlehem Memorandum in Support of Motion to Recuse Special Justice John Doug Hays at 3-4, Exh. B). On June 3, 1988, Special Justice Hays withdrew from representation of the plaintiffs in the Osborne case. Hays's withdrawal was based on the fact that his firm, Stratton, May & Hays, P.S.C., had represented Petitioners in another case (Appellants' Response to Motion to Recuse, Exh. 6). Moreover, Petitioners complained that the trial judge in this case, William T. Scott, had been a partner of Stratton, May & Hays for approximately two years after Judge Scott had left the bench (Bethlehem Memorandum in Support of Motion to Recuse Special Justice John Doug Hays at 13-15). Judge Scott had left the firm long before Special Justice Hays had been appointed in this case.

preme Court had rendered its June 4, 1992 Opinion against Petitioners (Id. at 17).[2]

Petitioners' Motion to Recuse and Petition for Rehearing sought prospective relief. Petitioners prayed that "Special Justice Hays . . . be recused from any further proceedings in this appeal and the Opinion of the Court of Appeals affirmed or, alternatively, this case must be reconsidered in its entirety by a constitutionally constituted court"

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[2]In their Motion to Recuse, Petitioners stated that they delayed filing the Motion in order to avoid antagonizing the court before the court issued its opinion (Bethlehem Memorandum in Support of Motion to Recuse Special Justice John Doug Hays at 17).

Petitioner BethEnergy Mine, Inc.'s counsel of record in the Kentucky Supreme Court, John M. Stephens and Lively M. Wilson, also represented Petitioner BethEnergy in the Osborne case (Appellants' Response to Motion to Recuse, Exh. C). Petitioners' counsel could not have avoided being aware, because of their frequent dealings with the firm of Stratton, May & Hays, of Judge Scott's previous association with this prominent Kentucky firm.

(Bethlehem Memorandum in Support of Motion to Recuse Special Justice John Doug Hays at 1-2 (emphasis added)). Similarly, the Petition for Rehearing prayed that the court of appeals' decision be "affirmed or, alternatively, this case reconsidered in its entirety" (Bethlehem Petition for Rehearing at 10).

On July 6, 1992, Petitioners filed a Motion for Leave to File a Supplemental Motion to Recuse Special Justice Hays and a Supplemental Petition for Rehearing. In this Motion, for the first time, Petitioners alleged that they were denied due process because the Chief Justice had selected Special Justice Hays at Justice Combs's suggestion (Bethlehem Memorandum in Support of Supplemental Motion to Recuse Special Justice John Doug Hays at 2). In their Supplemental Petition and Motion, Petitioners again demanded that "Special Justice Hays . . . be recused

from further participation in this appeal," and the appeal "reconsidered in its entirety by a constitutionally constituted court" (Id. at 5; Bethlehem Proposed Supplemental Petition for Rehearing at 1).

On August 25, 1992, the Kentucky Supreme Court decided Kentucky Utilities v. South East Coal Co., 836 S.W.2d 407 (Ky. 1992), cert. dismissed under Rule 46, 113 S. Ct. 1147 (1993). In that decision, the court upheld its procedure for appointment of a Special Justice, rejecting arguments based on the Kentucky Constitution.

On August 28, 1992, two Orders were entered by the Supreme Court of Kentucky in the instant litigation. In the first Order, Special Justice Hays recused himself sua sponte from further participation (Special Justice John Doug Hays's Order of Aug. 28, 1992 at App. 6a-7a),

thereby providing Petitioners with the precise relief requested. Although finding that Petitioners' Motion to Recuse stated no grounds for disqualification, Special Justice Hays stated that he acted in order to avoid any further allegation of impropriety (Id. at App. 7a).

In the second Order, the Kentucky Supreme Court denied Petitioners' Motion to Recuse and Motion to File a Supplemental Petition for Rehearing as moot, based upon Justice Hays's sua sponte recusal from further participation (Chief Justice Stephens's Order of Aug. 28, 1992 at App. 8a-8b). The supreme court further granted Petitioners' oral argument in support of their Petition for Rehearing (Id.).

On August 25, 1992, Petitioners filed a civil rights action in the United States District Court for the Eastern District of Kentucky against the individ-

ual justices of the Kentucky Supreme Court, Bethlehem Minerals Co. v. John Doug Hays et al., No. 92-86 (E.D. Ky., filed Aug. 25, 1992). The complaint sought injunctive relief to vacate the Kentucky Supreme Court's June 4, 1992 Opinion, on the same substantive grounds Petitioners had asserted in their pending petition for rehearing in state court. On January 20, 1993, the federal district court dismissed the complaint in the exercise of its discretion to abstain under the Younger v. Harris, 401 U.S. 37 (1971), doctrine (Jan. 20, 1993 Order).

After the federal district court dismissal, Petitioners filed a Motion for Leave to File a Second Supplemental Petition for Rehearing. Although ostensibly for the purpose of presenting supplemental authority related to the original petition for rehearing, Petitioners' Motion also included a proposed amendment

to their prayer for relief. The amendment omitted Petitioners' demand for reconsideration and sought in lieu thereof that Special Justice Hays's vote be excluded from the supreme court's tally and that the decision of the court of appeals be affirmed by a 3 to 3 vote (Bethlehem Proposed Supplemental Petition for Rehearing at 4). Respondents opposed this Motion, arguing that Petitioners had failed to file their Supplemental Petition within the 20-day period allowed by Ky. R. Civ. P. 76.32(2) and that the Special Justice issue should not be resurrected (Response and Objection to Motion for Leave to File Second Supplemental Petition for Rehearing at 2). On December 14, 1993, the Kentucky Supreme Court denied Petitioners' Motion without com-

ment (Dec. 14, 1993 Order at App. 11a-12a).[3]

After Justice Combs retired from the bench, a special election to select his replacement to serve out his term was held. On August 27, 1993, the Kentucky Supreme Court entered an Order assigning the Petition for Rehearing for oral argument on December 15, 1993 before the full court (Chief Justice Stephens's Aug. 28, 1993 Order).[4] At oral argument, Chief

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[3]In response to the dismissal of their federal action, Petitioners also filed a Motion to Enter Judgment and to Withdraw Petition for Rehearing if Motion Granted. This Motion, however, did not raise any federal question. The Motion alleged that the Kentucky Supreme Court's June 4, 1992 Opinion was void because it was rendered in violation of § 123 of the Kentucky Constitution (Bethlehem Motion to Enter Judgment and to Withdrawal Petition for Rehearing If Motion Granted at 2).

[4]Oral argument on Petitioners' Petition for Rehearing was consolidated with oral argument in a related case, Bethlehem Minerals Co. v. Church & Mullins Corp., No. 93-SC-587-TG (Pike Cir. Ct.), which was an appeal by Petitioners from the Pike County Circuit Court's denial of

Justice Stephens advised Petitioners' counsel that the court had upheld the constitutionality of its procedure for appointment of a Special Justice in the Kentucky Utilities case (Dec. 15, 1993 Tape of Oral Argument, 12:06:50 to 12:09:39).

On November 23, 1994, the Kentucky Supreme Court denied Petitioners' Petition for Rehearing by a 6 to 1 vote (Order Denying Petition for Rehearing, Petition for Writ of Certiorari at App. 16a). The court rejected all of Petitioners' state law arguments (Id. at App. 17a-18a). In response to Petitioners' due process theory, the court stated:

> [I]t is noteworthy that in this case petitioners were granted the relief they requested; after motion by petitioners,

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Petitioners' Motion to Vacate the Pike County Circuit Court judgments. On November 23, 1994, the Kentucky Supreme Court unanimously affirmed the trial court's denial of Petitioners' Motion to Vacate the judgments.

> Special Justice John Doug Hays, sua sponte, recused himself from further participation in the above-styled action to avoid any appearance of impropriety and this Court granted a second oral argument in this matter. The Court granted Petitioners the relief requested and there is nothing in the opinion of this Court to support the bald assertion by the petitioners that they were denied due process of law in this matter.

(Id. at App. 17a (emphasis added).)

SUMMARY OF THE ARGUMENT

Certiorari should be denied because Petitioners' claim that vacatur is the only available remedy to cure the alleged due process violation was not pressed or passed upon below. Moreover, certiorari should be denied because there is an independent and adequate state law ground for decision, which is that Petitioners obtained below the relief they had requested. Furthermore, certiorari should be denied because the Kentucky Supreme

Court's rehearing on the merits makes this controversy moot.

Even assuming arguendo that there is no procedural bar to review in this Court, certiorari should be denied because the Kentucky Supreme Court's Order Denying Petitioners' Petition for Rehearing does not conflict with Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986), or otherwise raise any important issue of federal law. Petitioners do not allege that any justice or Special Justice who participated in the June 4, 1992 decision had any direct, personal, substantial, and pecuniary interest in the outcome. There is no record evidence to support Petitioners' allegation that Justice Combs had any such interest in the decision, but, in any event, he recused himself from consideration on the merits. Petitioners' allegation that Justice Combs personally selected Special Justice

Hays is not supported by the record and does not provide a basis for any substantial federal due process claim.

REASONS FOR DENYING THE WRIT

I. CERTIORARI MUST BE DENIED ON THE GROUND THAT PETITIONERS' CLAIM THAT DUE PROCESS REQUIRES VACATUR OF THE KENTUCKY SUPREME COURT'S JUNE 4, 1992 OPINION WAS NOT PRESSED OR PASSED ON BELOW.

Petitioners assert that prospective recusal of Special Justice Hays did not cure the denial of due process and that vacatur is the only acceptable remedy (Petition for Writ of Certiorari at 12). However, this claim was not pressed by Petitioners or passed on by the Kentucky Supreme Court, and therefore the claim has been procedurally defaulted. In reviewing the decisions of state courts, this Court will not decide federal claims that were not pressed or passed on below.

Clark v. Jeter, 486 U.S. 456, 459-60 (1988).

Petitioners sought prospective recusal and reconsideration in their pleadings below as the remedy for the alleged due process violation (Bethlehem Motion to Recuse at 1-2; Bethlehem Petition for Rehearing at 10; Bethlehem Memorandum in Support of Supplemental Motion to Recuse Special Justice John Doug Hays at 5; Bethlehem Proposed Supplemental Petition for Rehearing at 1). In Petitioners' proposed Second Supplemental Petition for Rehearing, Petitioners, for the first time, demanded that Special Justice Hays's vote be excluded and the court of appeals' decision be affirmed on a 3 to 3 vote (Bethlehem Proposed Supplemental Petition for Rehearing at 4). However, the proposed Supplemental Petition, which the Kentucky Supreme Court refused to hear because of Petitioners' procedural

default, requested this remedy only for alleged violations of the Kentucky Constitution (Id. at 1-3). Petitioners did not mention the federal due process clause, let alone request vacatur for denial of due process (Id.). Petitioners' failure to allege that due process required affirmance of the court of appeals' decision or vacatur of the Kentucky Supreme Court's June 4, 1992 Opinion bars them from making this claim on appeal. See Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 77-78 (1988) (challenge to punitive damages award barred where appellant failed to refer to federal excessive fines clause as basis for its claim that damages awarded were excessive).

II. CERTIORARI SHOULD BE DENIED BECAUSE THERE IS AN INDEPENDENT AND ADEQUATE STATE LAW GROUND FOR DECISION, SINCE PETITIONERS OBTAINED THE RELIEF THEY REQUESTED, WHEN SPECIAL JUSTICE HAYS RECUSED HIMSELF FROM FURTHER PARTICIPATION IN THE PROCEEDINGS BELOW AND WHEN THE KENTUCKY SUPREME COURT RECONSIDERED THE MERITS OF THE WILLFUL TRESPASS ISSUE.

This Court will not consider an issue of federal law on direct review from the judgment of a state court if that judgment rests on a state law ground that is independent of the merits of the federal claim and is an adequate basis for the court's decision. Fox Corp. v. Muller, 296 U.S. 207, 210 (1935); Murdock v. Memphis, 87 U.S. (20 Wall.) 590, 635-36 (1875). This rule applies regardless of whether the state law ground is substantive or procedural. Coleman v. Thompson, 111 S. Ct. 2546, 2554 (1991).

An independent and adequate state law ground for the decision here is that Petitioners obtained the relief they had

requested below. Petitioners sought only prospective recusal of Special Justice Hays and reconsideration on the merits in their Supplemental Motion to Recuse and in their Supplemental Petition for Rehearing, where Petitioners raised for the first time a claim that they were denied due process because Justice Combs allegedly had suggested Special Justice Hays's appointment (Bethlehem Memorandum in Support of Supplemental Motion to Recuse Special Justice John Doug Hays at 5; Bethlehem Proposed Supplemental Petition for Rehearing at 1). Petitioners obtained the precise relief requested: Special Justice Hays recused himself from further participation in this case, and the Kentucky Supreme Court granted Petitioners a rehearing on the merits.

Although the Order Denying Petitioners' Petition for Rehearing also states that there was no due process violation,

the plain statement rule of Michigan v. Long, 463 U.S. 1032 (1983), and its progeny has no application here. Under Long, if "it fairly appears that the state court rested its decision primarily on federal law, or to be interwoven with federal law," this Court may reach the federal question unless the state court's opinion contains a "'plain statement' that [its] decision rests upon adequate and independent state grounds." Id. at 1042.

Viewed in its full context, the Kentucky Supreme Court's decision rested primarily on the basis that Petitioners had obtained the relief requested, i.e., prospective recusal of Special Justice Hays and a rehearing on the merits. The August 28, 1992 Order denied Petitioners' Motion to Recuse and Motion for Leave to File a Supplemental Petition for Rehearing, expressly on this basis. Since this

Order clearly was based on state law, this Court must presume that the subsequent denial of Petitioners' Petition for Rehearing did not silently disregard the state law ground as an adequate and independent ground for decision. See Ylst v. Nunnemaker, 111 S. Ct. 2590, 2594, 2596 (1991). In denying the Petition for Rehearing, the Kentucky Supreme Court did not ignore the procedural bar; it expressly held that Petitioners had obtained the relief requested.

Moreover, although Petitioners complain now that the Kentucky Supreme Court did not apply a de novo standard of review in rehearing this case, Petitioners did not request de novo review in their Petition for Rehearing. Petitioners presented no new arguments on the merits in their Petition for Rehearing, and the justices were singularly unimpressed with Petitioners' Petition.

Seven months after the court had entered its August 28, 1992 Order, the court denied as untimely Petitioners' Motion for Leave to File a Second Supplemental Petition for Rehearing. If granted, this Motion would have withdrawn Petitioners' demand for reconsideration in lieu of a demand that Special Justice Hays's vote be treated as void and that the court of appeals' decision be affirmed by a 3 to 3 vote. Since this Motion was denied as a result of Petitioners' procedural default,[5] there is an independent and adequate ground for the

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[5]Although the Order denying Petitioners' leave to file their proposed second Supplemental Petition gave no rationale, it is clear that the Order was based on Petitioners' procedural default. Respondents opposed the Motion solely on the state law ground that it was untimely and that the Special Justice issue should not be resurrected. Ky. R. Civ. P. 76.32(2) requires that a Petition for Rehearing be filed within 20 days of the court's decision, and the time limitation may not be waived. The court accordingly did not reach the merits of the second Supplemental Petition.

Kentucky Supreme Court's denial of leave to supplement Petitioners' Petition for Rehearing.

Under all of these circumstances, certiorari must be denied, since there is an independent and adequate state law ground for the decision. Petitioners obtained below the relief they requested, and Petitioners' Motion for Leave to File a Second Supplemental Petition for Rehearing was denied based on Petitioners' procedural default.

III. CERTIORARI MUST BE DENIED BECAUSE THE CONTROVERSY IS MOOT, SINCE THE KENTUCKY SUPREME COURT REHEARD THE WILLFUL TRESPASS ISSUE AND DECIDED THE ISSUE AGAINST PETITIONERS BY A 6 TO 1 VOTE.

Under Article III of the Constitution, federal courts may adjudicate only actual ongoing cases or controversies. Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1990). Article III denies to

federal courts the power to decide questions that cannot affect the rights of litigants. Id. at 477. Moreover, the case-or-controversy requirement exists through all stages of trial and appellate proceedings. Id.

Petitioners allege that due process requires vacatur of the Kentucky Supreme Court's June 4, 1992 Opinion and reconsideration of the decision on its merits by a properly constituted court. However, Petitioners already have obtained a rehearing by a regularly constituted panel of justices on the merits of their willful trespass issue, which is the only substantive issue preserved by Petitioners in their Petitioner for Rehearing. The Kentucky Supreme Court's November 23, 1994 Order Denying Petition for Rehearing clearly reached and decided adversely to Petitioners the merits of the case, by a 6 to 1 vote. Because Petitioners already

have obtained all the relief to which they are entitled, the case is moot.

IV. THE KENTUCKY SUPREME COURT'S ORDER DENYING PETITIONERS' PETITION FOR REHEARING DOES NOT CONFLICT WITH AETNA LIFE INSURANCE CO. v. LAVOIE, 475 U.S. 813 (1986), OR OTHERWISE RAISE ANY IMPORTANT ISSUE OF FEDERAL LAW.

Petitioners' argument that Special Justice Hays is clothed with the same cloak of disqualification worn by Justice Combs because Justice Hays was selected from Justice Combs's standing list of qualified attorneys is nothing less than a direct challenge to Kentucky's judicial selection system. Petitioners have no support for their theory that due process requires federal supervision of Kentucky's judicial selection process.

Petitioners correctly recognize that Aetna Life Insurance Co. v. Lavoie, supra, 475 U.S. at 828, defines the circumstances where due process requires

judicial disqualification of a particular justice for reasons peculiar to that case. In Aetna Life, the Court observed that not "[a]ll questions of judicial qualification . . . involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would generally seem to be matters merely of legislative discretion." Id. at 820 (quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927)). Due process, however, requires that no judge "be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." Aetna Life Insurance Co. v. Lavoie, supra, 475 U.S. at 822 (quoting In re Murchison, 349 U.S. 133, 136 (1955)). The Court concluded that due process is violated where a judge has a "direct, personal, substantial, pecuniary interest in reaching a conclusion." Aetna Life Insurance Co. v.

Lavoie, supra, 475 U.S. at 820. In Aetna, due process was violated by the participation of an Alabama Supreme Court justice in a decision addressing unsettled issues affecting the recovery of punitive damages for bad-faith refusal to pay an insurance claim where identical legal issues were present in two pending state court actions filed by the justice against insurance companies. Id. at 823-24.

The present case does not bear even the remotest resemblance to the situation in Aetna Life. Unlike Aetna Life, Petitioners do not contend in their Petition for a Writ of Certiorari that any Supreme Court justice or Special Justice who participated in the decision in this case had any direct, personal, substantial, and pecuniary interest in the outcome. Petitioners instead allege that Justice Combs had a direct, personal, substan-

tial, and pecuniary interest in the outcome of this case when the Kentucky Supreme Court granted discretionary review. The record contains no evidence to support such an allegation, but even assuming arguendo that the allegation were true, there would be no denial of due process.

The due process clause protects against situations where there is a high probability of actual bias on the part of the decisionmaker. See Withrow v. Larkin, 421 U.S. 35, 47 (1975); Offutt v. United States, 348 U.S. 11, 17-18 (1954). Justice Combs recused himself and did not vote or otherwise participate in the panel that decided this case. There is no evidence that any decisionmaker below violated the Aetna Life constitutional barrier by "act[ing] as a judge in his own case." Aetna Life Insurance Co. v. Lavoie, supra, 475 U.S. at 824.

Petitioners' allegation that their due process rights were violated by Justice Combs's direction or selection of his replacement raises no substantial federal question. In the first instance, the Kentucky Supreme Court's records, through which the court speaks, establish that Chief Justice Stephens, not Justice Combs, selected Special Justice Hays.

Moreover, Petitioners' suggestion that the unconstitutional risk of bias is created when a recused justice suggests his replacement is meritless. There is a "presumption of honesty and integrity in those serving as adjudicators." Withrow v. Larkin, supra, 421 U.S. at 47. Petitioners have not set forth any legal or factual basis for their allegation that the Kentucky Supreme Court's procedure for appointment of a Special Justice results in biased decisionmaking or otherwise warrants the extraordinary action of

federal interference with Kentucky's judicial selection process.

Petitioners do not allege in their Petition for a Writ of Certiorari that Justice Combs's replacement, Special Justice Hays, or any other justice who sat in decision of this case, had any direct, personal, substantial, and pecuniary interest in the outcome. They have waived any right to make such a claim here. See Bray v. Alexander Clinic, 113 S. Ct. 753, 765 (1993).

CONCLUSION

The Petition for a Writ of Certiorari must be denied.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF KENTUCKY

90-SC-081-DG

CHURCH AND MULLINS CORPORATION, ET AL. — APPELLANTS

ON REVIEW FROM COURT OF APPEALS
NO. 87-CA-001052
(Pike Circuit Court No. 00-72-88-43D)

V.

BETHLEHAM MINERALS COMPANY, ET AL. — APPELLEES

to be heard with:

90-SC-000784-DG

BETHLEHAM MINERALS COMPANY, ET AL. — APPELLANTS

ON REVIEW FROM COURT OF APPEALS
NO. 87-CA-001052
(Pike Circuit Court No. 00-07-28843D)

V.

CHURCH AND MULLINS CORPORATION, ET AL. — APPELLEES

ORDER

Honorable John D. Hays, a member of the Kentucky Bar with offices in Pikeville, Kentucky, who was appointed by Chief Justice Robert F. Stephens to sit as special justice of the Supreme Court

in the determination of this cause by reason of the disqualification of Justice Dan Jack Combs, was on September 17, 1991, prior to any consideration of this cause, administered the Constitutional Oath by the undersigned.

ENTERED September 17, 1991.

Charles M. Leibson
Deputy Chief Justice

PROCEDURE FOR APPOINTMENT OF A SPECIAL JUSTICE OF THE SUPREME COURT OF KENTUCKY

This Court hereby adopts the following policy to be employed when one member of the Court is disqualified from sitting in a case. SCR 1.020(1), Ky. Const. §116.

1. Jurisdiction

Pursuant to KRS 26A.015(3)(a), any Justice disqualified under the provisions of that section shall be replaced by the Chief Justice.

Therefore, if a justice disqualifies himself from participation in the consideration of a case before it is ready for review by the members of the Court, the Chief Justice shall appoint an attorney to serve as a Special Justice of the Kentucky Supreme Court. A case is "ready for review" within the meaning of this rule ten days before it is scheduled for oral argument.

2. Selection of Special Justice

At the beginning of the annual term of the Supreme Court each justice shall provide the Chief Justice with a list of not less than ten attorneys from his district who meet the constitutional qualifications for service and have the ability to serve as a special justice.

Once advised of a justice's disqualification, the Chief Justice shall appoint a special justice from the list previously submitted to him by the disqualified justice.

3. Notice of Selection

An order appointing a special justice shall be filed with the Clerk of the Supreme Court and entered in the record of the case. Copies of the order of appointment shall be circulated to the Special Justice, the Justices of the Supreme Court and the parties to the action.

4. Service as Special Justice

The Supreme Court Administrator shall coordinate the service of Special Justices of the Supreme Court. Compensation for each 7.5 hour day of service as a Special Justice is $262.53 per day, plus 20.5 per mile for travel connected with court service.

All sitting. All concur except Wintersheimer, J., dissents.

ENTERED October 16, 1989.

Robert F. Stephens
Chief Justice

SUPREME COURT OF KENTUCKY

90-SC-000081-DG
90-SC-000784-DG

CHURCH AND MULLINS CORPORATION;
CLAUDE JOHNSON, Individually, etc.;
CHARLIE JOHNSON; JACK JOHNSON;
MARTHA KENDRICK; PRISCILLA STILTNER;
HAZEL JOHNSON; BEN JOHNSON; MOLLY
THORNBERRY; BETTY JANE JOHNSON
STEWARD

MOVANTS/CROSS-RESPONDENTS

ON REVIEW FROM COURT OF APPEALS
NOS. 87-CA-000988 and 87-CA-001052
(Pike Circuit Court No. 00-72-88-43D)

V.

BETHLEHEM MINERALS COMPANY;
BETHLEHEM MINES CORPORATION;
BETH-ELKHORN CORPORATION;
BETH ENERGY MINES, INC.

RESPONDENTS/CROSS-MOVANTS

ORDER

Comes John Doug Hays, duly appointed Special Justice of the Supreme Court of Kentucky, being advised of the motion of respondents/cross-movants for his recusal by the Supreme Court of Kentucky, and hereby sua sponte recuses himself from further deliberation and participation in

the proceedings in the above styled actions. No grounds have been stated by the respondents/cross-movants which would justify the disqualification of this Special Justice, pursuant to KRS 26A.015(3)(a). However, in order to avoid any further allegation or appearance of impropriety, said Special Justice hereby recuses himself from further participation in the above-styled action.

John Doug Hays
John Doug Hays

ENTERED: August 28, 1992.

SUPREME COURT OF KENTUCKY

90-SC-000081-DG
90-SC-000784-DG

CHURCH AND MULLINS CORPORATION;
CLAUDE JOHNSON, Individually, etc.;
CHARLIE JOHNSON; JACK JOHNSON;
MARTHA KENDRICK; PRISCILLA STILTNER;
HAZEL JOHNSON; BEN JOHNSON; MOLLY
THORNBERRY; BETTY JANE JOHNSON
STEWART

MOVANTS/CROSS-RESPONDENTS

ON REVIEW FROM COURT OF APPEALS
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BETHLEHEM MINES CORPORATION;
BETH-ELKHORN CORPORATION;
BETH ENERGY MINES, INC.

RESPONDENTS/CROSS-MOVANTS

ORDER

This Court being advised that in the interest of avoiding any appearance of impropriety on his part or the part of this Court, Special Justice John Doug Hays has sua sponte recused himself from further participation herein, the motion of respondents/cross-movants to recuse

Special Justice John Doug Hays from further deliberations and participation in the above-styled actions is denied as being moot.

The motion of respondents/cross-movants for oral argument in support of their petition for rehearing is granted. Such oral argument will be scheduled by further order of this Court.

The motion of respondents/cross-movants for oral argument in support of their motion to recuse Special Justice Hays is denied as being moot.

The motion of respondents/cross-movants for leave to file a supplemental petition for rehearing is denied because the additional evidence contained therein pertains to the participation of Special Justice John Doug Hays whose recusal renders said issue moot.

Stephens, C.J. and Lambert, Leibson, Reynolds, Spain and Wintersheimer, JJ.,

sitting. Combs, J., not sitting. All concur.

ENTERED August 28, 1992.

Robert F. Stephens
Chief Justice

SUPREME COURT OF KENTUCKY

90-SC-000081-DG
90-SC-000784-DG
93-SC-000587-TG

BETHLEHEM MINERALS COMPANY,
BETHLEHEM MINES CORPORATION,
BETH-ELKHORN CORPORATION, AND
BETHENERGY MINES, INC.

APPELLANTS, APPELLEES
AND CROSS APPELLANTS

APPEAL FROM COURT OF APPEALS
NO. 87-CA-000988, NO. 87-CA-0001052
AND NO. 93-CA-1299
(Pike Circuit Court No. 00-07-28843D)

V.

CHURCH AND MULLINS CORPORATION,
CLAUDE JOHNSON, Administrator of
the Estate of John Johnson and
Individually, CHARLIE JOHNSON,
JACK JOHNSON, MARTHA KENDRICK,
PRISCILLA STILTNER, HAZEL JOHNSON,
BEN JOHNSON AND MOLLY THORNBERRY,
AND BETTY JANE JOHNSON STEWART

APPELLEES, APPELLANTS
AND CROSS-APPELLEES

ORDER

Appellees' motion for leave to file a second supplemental petition for re-hearing is denied.

Lambert, Leibson, Reynolds and Spain, JJ., sitting. All concur.

ENTERED December 14, 1993.

Robert F. Stephens
Chief Justice